

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS LOUIS REESE,

Defendant-Appellant.

UNPUBLISHED

May 26, 2005

No. 253400

Wayne Circuit Court

LC No. 03-010210-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN DWIGHT WARE,

Defendant-Appellant.

No. 253441

Wayne Circuit Court

LC No. 03-010210-01

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

In Docket No. 253400, defendant, Thomas Louis Reese (“Reese”), appeals his jury trial conviction of conspiracy¹ to commit first-degree murder.² The trial court sentenced Reese to life imprisonment. In Docket No. 253441, defendant, Calvin Dwight Ware (“Ware”), appeals his jury trial convictions of first-degree murder and possession of a firearm during the commission of a felony (felony-firearm).³ The trial court sentenced Ware to life imprisonment for the first-degree murder conviction, and two years' imprisonment for the felony-firearm conviction. We affirm in both cases.

¹ MCL 750.157a.

² MCL 750.316.

³ MCL 750.227b.

I. DOCKET NO. 253400

Reese argues that the trial court abused its discretion by denying his motion for directed verdict.⁴

A conspiracy is mutual agreement or understanding, express or implied, between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means. Being a specific-intent crime, conspiracy requires both the intent to combine with others and the intent to accomplish the illegal objective. The essence of a conspiracy is the agreement itself. Nevertheless, direct proof of agreement is not required, nor is proof of a formal agreement necessary. It is sufficient that the circumstances, acts, and conduct of the parties establish an agreement. A conspiracy may be proven by circumstantial evidence or may be based on inference. The crime of conspiracy is complete upon formation of the agreement. No overt act in furtherance of the conspiracy is necessary. [*People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991) (citations omitted).]

Reese says that there was not enough evidence for a jury to find that he was involved in a conspiracy to commit first-degree murder. Stephanie Sanders testified that on December 21, 2002, she witnessed Ware murder Derrick Golden after Reese had Reese's son go and get Ware. Sanders testified that Ware was Reese's enforcer, who was known to kill someone if Reese asked. Latina Whatley stated that Reese introduced Ware to Latina Whatley as his "new right-hand man." Reese gave Latina Whatley the indication that Ware was his enforcer also. In brief, the evidence showed that Reese called Ware to the scene, and Ware then shot Golden. If the jury finds these statements by the witnesses credible, this would be ample evidence for a jury to find that defendant was involved in a conspiracy to commit first-degree murder. *People v Riley*, 468 Mich 135, 141-142; 659 NW2d 611 (2003).

Accordingly, we hold that the trial court properly denied Reese's motion for directed verdict.

II. DOCKET NO. 253441

A. Verdict Against the Great Weight of the Evidence

Ware maintains that his convictions are contrary to the great weight of the evidence.⁵ A verdict is against the great weight of the evidence if the evidence preponderates so heavily

⁴ When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor at the time of the motion for directed verdict, viewed in the light most favorable to the prosecutor, could have persuaded a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Sexton*, 250 Mich App 211; 646 NW2d 875 (2002).

⁵ A motion for a new trial is needed to preserve a claim that a verdict is against the great weight of the evidence. *People v Harding*, 443 Mich 693, 736; 506 NW2d 482 (1993). On August 20, 2004, Ware filed a motion to remand to move for a new trial stating that the verdict was against
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against the verdict such that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

A verdict may only be vacated when it “does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence.” *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted). Questions regarding the credibility of witnesses and conflicting testimony do not constitute sufficient grounds for granting a new trial. *Lemmon*, *supra* at 643. When there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *Id.*

There are several very narrow exceptions where the trial court is permitted to make judgment on the credibility of a witness. *Lemmon*, *supra* at 643. These exceptions, that so seriously undermine the credibility of a witness’ testimony, include:

when the testimony contradicts indisputable physical facts or laws, where the testimony is patently incredible or defies physical realities, where a witness’s testimony is material and so inherently implausible that a reasonable juror could not believe it, or where the witness testimony has been so seriously impeached and the case marked by uncertainties and discrepancies. [*Id.* at 643-644 (citations omitted).]

At trial, Sanders was the only witness to place Ware at the scene of the shooting. Sanders testified that Ware left Country’s house and went around the block, and ended up at the side of the Apex Bar. Ware got out of the car, slammed the door, and walked toward Golden with a pistol in his hand. Ware said to Golden, “Man, I know you’re not f----- with my people’s s---.” Golden told Ware, “Man, you know me better than that.” Ware walked up to Golden and put his arm around him, and Sanders heard two shots.

Ware claims that Sanders’ testimony is not credible because she was repeatedly impeached. For example, Sanders stated that she saw Ware murder “Reno” Rankins, when records show that she was not released from prison until four days after Rankins was murdered. In response to this assertion, Sanders stated that she was released early. Ware also argues that Sanders stated that she frequented the area, but Apex bar owner, Marvelous Persell, did not know her. Ware further presented a private investigator who testified that it was too dark in that area to see what Sanders claimed to have seen. Yet, there is also testimony that bolstered Sanders’ version of events. Joyce Whatley and Latina Whatley both testified that Ware was an enforcer for Reese. Latina Whatley stated that Reese introduced Ware as his new “right-hand man.” Officer Robert Crisp testified that when he arrived at the scene at 2:00 a.m., it was well lit and he did not have a problem seeing down the street.

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the great weight of the evidence, which this Court denied on September 28, 2004, and thus, the issue is not preserved. Because this issue is unpreserved, this Court reviews it for plain error affecting Ware’s substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

Ware claims that Sanders' testimony was seriously impeached and marked by uncertainty and discrepancies. Sanders' testimony is material to the case, as she is the only eyewitness to identify defendant as the perpetrator. However, Sanders' testimony is not so inherently implausible that a reasonable juror could not believe it. Certainly, the jury could have believed that Sanders saw Ware murder Golden, and that she frequented the area though Persell never saw her before, and the jury also could have believed that she was released early from prison.

Accordingly, we hold that Ware's verdict is not against the great weight of the evidence, and that there is no plain error requiring reversal.

B. Alleged Prosecutorial Misconduct

Ware alleges several instances of prosecutorial misconduct.⁶ A prosecutor has "great latitude" in making his arguments and statements at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may draw inferences from the evidence, but may not argue facts not in evidence or mischaracterize the evidence. *Id.*; *People v Goodin*, 257 Mich App 425, 532-433; 668 NW2d 392 (2003); *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

After a careful review of the record, we conclude that Ware's arguments lack merit, and were we to hold otherwise, any prejudice could have been cured by a cautionary instruction to the jury that the prosecutor's comments should be disregarded. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

C. The Trial Court's Alleged Misconduct

Also, Ware argues that the trial court was biased and denied him a fair trial.⁷ A trial court has broad, but not unlimited, discretion and power in the matter of trial conduct. *People v*

⁶ Issues of prosecutorial misconduct are reviewed de novo. To determine if prosecutorial misconduct occurred, the test is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The Court must examine the pertinent portion of the lower court record and evaluate the prosecutor's comments in context to determine whether it was more probable than not that a miscarriage of justice occurred. *People v Carines*, 460 Mich 750, 774; 597 MW2d 130 (1999).

⁷ To preserve most issues, a party must object below. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). In this case, Ware objected to the conduct of the trial court when it stated that Sanders was released early but did not object to any other conduct of the trial court. Therefore, the statement regarding Sanders' release is preserved and all other claims are unpreserved. A preserved claim of a trial court piercing the veil of judicial impartiality is reviewed for an abuse of discretion. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Because Ware failed to object to any of the other complained-of comments or conduct, appellate review on those comments is precluded absent a showing of plain error that affected defendant's substantial rights. *Carines*, *supra* at 763. Plain error warrants reversal only where the error resulted in the conviction of an innocent defendant or if the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.*

Taylor, 252 Mich App 519; 652 NW2d 526 (2002); *People v Hartsuff*, 213 Mich App 338, 349; 539 NW2d 781 (1995). Portions of the record should not be taken out of context, and the record must be reviewed as a whole. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995); *People v Collier*, 168 Mich App 687, 697-698; 425 NW2d 118 (1988). In a criminal trial, the defendant is entitled to a neutral and detached magistrate of justice. *People v Conyers*, 194 Mich App 395, 398; 487 NW2d 787 (1992). Actions of the court in matters of trial conduct must not pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). A trial court's conduct pierces the veil of judicial impartiality where it unduly influences the jury by its comments or conduct and thereby deprives the defendant of a fair and impartial trial. *Paquette*, *supra* at 340.

Our review of the record leads us to conclude that the trial court did not interfere with the integrity or fairness of the trial.⁸

D. Rebuttal Testimony

Ware argues that Officer Crisp's rebuttal testimony was outside the scope of rebuttal and that his counsel was ineffective for failing to object to the testimony.⁹

Rebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by the other party" and tending to weaken or impeach it directly. *People v Pesquera*, 244 Mich App 305, 314; 625 NW2d 407 (2001). Here, the prosecution called Officer Crisp as a rebuttal witness. Officer Crisp testified to the fact that a defense witness had informed the police that he was not at the scene at the time of the murder and did not witness the shooting because he was at home when he heard the gunshots. This rebuttal testimony was offered to contradict the witness's testimony that he saw the murder and that someone other than Ware shot Golden. Accordingly, because this testimony was offered to disprove evidence presented in Ware's and Reese's case in chief, we hold that it was properly admitted. *Pesquera*, *supra* at 314.¹⁰

⁸ We would note, however, that although they did not deprive Ware of a fair trial, some of the comments made by the trial court come uncomfortably close to the line between propriety and impropriety.

⁹ A defendant may preserve the issue regarding rebuttal testimony with a timely objection. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). In this case, Ware failed to object, and therefore, this issue is not preserved for appeal. Because Ware did not preserve this issue for review, review is limited to determining if there was plain error affecting defendant's substantial rights. *Cairnes*, *supra* at 763.

¹⁰ We reject Ware's argument that defense counsel was ineffective for failing to object to Officer Crisp's rebuttal testimony because counsel does not need to make a meritless objection to act effectively. *People v Hawkins*, 245 Mich App 439, 454-455; 628 NW2d 105 (2001), citing *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski